STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN L. HOLLEY,
Appellant,

v.

Secretary, DEPARTMENT OF COMMERCE,
Respondent.

Case No. 98-0016-PC

FINAL DECISION AND ORDER

This matter was filed as an appeal arising from the decision not to hire the appellant. The issue for hearing read:

> Whether respondent committed an illegal action or an abuse of discretion in connection with the alleged offer and withdrawal of appointment to the position in question.

After the completion of an administrative hearing on the above issue, the parties filed briefs, and the hearing examiner issued a proposed decision and order pursuant to §227.46(2), Stats. After considering the objections to the proposed decision, the Commission issued an interim decision and order dated January 13, 1999, that had the effect of adopting that aspect of the proposed decision concluding that appellant "failed to sustain his burden of establishing that respondent's personnel actions were an abuse of discretion," or that respondent had violated §230.43(2), Stats. However, the Commission rejected that portion of the proposed decision addressing appellant's argument that respondent had violated the Fair Employment Act prohibition against discrimination based on disability: "The Commission does not agree with either the proposed decision's conclusion that respondent has waived its right to object to the introduction into this proceeding via complainant's post-hearing brief of an issue under the WFEA (Wisconsin Fair Employment Act), or its conclusion that it is appropriate to effectively allow the reference in complainant's brief to serve as an amendment to the original appeal and to proceed to decide the WFEA issue thus presented without further notice and

opportunity for hearing." The Commission remanded the matter to the examiner to "determine, after the parties have an opportunity for input, whether to permit amendment of the appeal by the material concerning the WFEA set forth in complainant's post-hearing brief, and to conduct such further evidentiary proceedings as he should deem necessary."

The examiner convened a conference with the parties on February 26, 1999. The results of the conference are described in a letter to the parties of the same date:

> During a telephone conference held earlier today, the appellant indicated he wished to consult with an attorney in terms of his next step in this case. Respondent indicated it would oppose any effort by the appellant to amend his appeal to add a claim of disability discrimination under the Fair Employment Act.
>
> In light of the delay in scheduling this conference, I established the following schedule for the appellant to decide whether he is going to seek to amend his appeal:
>
> Appellant is to indicate, in writing, and by March 12, 1999, whether he wishes to seek to amend his appeal as outlined above.
>
> If so, the respondent will have until March 26, 1999, to file its objections to the appellant's request.
>
> Appellant will then have until April 2, 1999, to file a reply.

By letter dated March 10, 1999, appellant wrote: "This is to inform you that John L. Holley wishes to amend his appeal to add a claim of disability discrimination under the Fair Employment Act." Respondent opposed the request and filed a letter setting forth various arguments for denying appellant's request. Appellant did not file any substantive reply to the objections or otherwise offer any information in support of his March 10th request to amend. The following facts appear to be undisputed and are based on materials in the Commission's case file.

FINDINGS OF FACT

1. Appellant filed his letter of appeal in this matter on March 9, 1998. The letter stated, in part:

> I am writing to request that an appeal be filed regarding the February 24th denial of my recent appointment to the position of Elevator Inspector II for the Sheboygan County area. . . .
>
> I am seeking a resolution to this conflict, and would appreciate your taking action on this matter as soon as possible. I understand considerations are currently being made for an Elevator Inspector II in the Waukesha area.

2. A prehearing conference was convened on an expedited basis on March 17, 1998. During the conference, the hearing examiner proposed the following statement of issue for hearing:

> Whether respondent committed an illegal action or an abuse of discretion in connection with the alleged offer and withdrawal of appointment to the position in question.

The conference report indicated the Commission's jurisdiction over the appeal was premised on §230.44(1)(d), Stats., which provides for appeals of post-certification actions related to the hiring process which are alleged to be illegal or an abuse of discretion. The parties were provided one week to file an objection to the proposed issue. Neither party filed an objection.

3. A hearing was initially scheduled for March 31, 1998, but was postponed until April 28th at the appellant's request.

4. A telephone conference was held between the parties on April 24th. During the conference appellant requested postponement so his wife could prepare for her role as a witness. The hearing was later postponed again, until June 5th, at appellant's request.

5. By letter faxed and mailed to appellant on March 25, 1999, respondent identified two exhibits for the scheduled hearing. Both documents were internal memos

dated February 24, 1998. One memo was from Harold Stanlick, section chief for Field Operations in Waukesha, to Bennette Burks, Director of the Field Operations Bureau. That memo read:

> Talked to Tim Marty about John Holley as he has worked with him. Tim's comments were that he could not rate Mr. Holley very high as his work was not up to standard and knows that he had physical problems that would affect his work.
>
> Talked to Mr. Holley's former employer. Mr. Rather wanted to remain anonymous. He stated that they laid Mr. Holley off because he did not do his work to their standard. He was also found with alcohol on the job and had at least two bouts with alcohol. They also stated that Mr. Holley had trouble with his feet and could not stand on them all day. They would not hire Mr. Holley back.

In the other February 24th memo, Mr. Burks wrote his supervisor:

> On February 18, I sent you a memo recommending John L. Holley for the position of elevator inspector assigned to the Waukesha office. I made the recommendation based on information I had at the time. Since making that initial recommendation, I have learned that Mr. Holley has had problems with on-the-job alcohol use and suffers from a foot ailment that impedes his ability to stand. I withdraw my recommendation.
>
> Some of the information was provided to me this morning by Bernie Zalewski, an elevator inspector who has first-hand experience with Mr. Holley. According to Bernie, Mr. Holley was not maintaining elevators properly, causing Bernie to issue numerous orders for safety violations. Bernie also alleged alcohol and foot ailments and stated that Tim Marty, another elevator inspector, and Richard Rather, one of Mr. Holley's former supervisors could provide further information. I instructed the section chief for the Waukesha area, Harold Stanlick to contact these persons and confirm Bernie's observations. Bernie's information was confirmed by the other contacts.
>
> According to Harold, Tim's observations were similar to Bernie's. Mr. Rather reported that Mr. Holley was involved in at least two alcohol-related episodes and was not maintaining equipment as required by Otis Elevator Co. (Holley's employer at the time) standards. Otis Elevator Co. would not hire Mr. Holley back.

> At this time, there are no other candidates from the Waukesha area I can recommend. The position should be re-advertised. . . .

6. The hearing was held on June 5th. Both of the exhibits referenced in finding of fact 5 were admitted by stipulation of the parties at the commencement of the hearing. At no time during the hearing did appellant suggest he wished to pursue a claim of disability discrimination. At the close of the hearing, the parties agreed to a briefing schedule. Initial briefs from both parties were to be postmarked by July 6, 1998.

7. Appellant first mentioned the issue of disability discrimination in the last paragraph of his 5-page initial brief:

> The Department of Commerce *may* have been impermissibly motivated in the rejection of employment by concerns about foot [sic] and alcoholism. Under state and federal disability anti-discrimination laws (i. e., the Wisconsin Fair Employment Act, Wis. Stats. 111.31 et seq) and the Americans with Disabilities Act 42 USC 12101 et seq) an employer may not refuse to hire an individual due to an (in this case, an alleged) disability who is otherwise qualified. (emphasis added)

The only claims of illegal actions that appellant directly argued in his brief involved violations of §§230.43(1)(d) and 230.43(2), Stats.

8. By letter received on March 11, 1999, complainant indicated he wished to add a claim of disability discrimination under the Fair Employment Act.

OPINION

The original letter of appeal, filed on March 9, 1998, invoked the Commission's jurisdiction pursuant to §230.44(1)(d), Stats.:

> A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

The time limit for filing appeals is established in §230.44(3), Stats:

> Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30

> days after the appellant is notified of the action, whichever is later, except that if the appeal alleges discrimination under subch. II of ch. 111 [the Wisconsin Fair Employment Act], *the time limit for that part of the appeal alleging such discrimination shall be 300 days after the alleged discrimination occurred.* (emphasis added)

The 300 day time limit for filing claims under the Wisconsin Fair Employment Act (WFEA) is also set forth in §111.39(1), Stats. The question raised by this case is whether the appellant should be permitted to amend his appeal to add a claim under the WFEA more than 300 days after the underlying personnel action and after the Commission has already held a hearing on the appeal.

Pursuant to §PC 3.03(2), Wis. Adm. Code, the Commission has discretion in terms of permitting an amendment to an appeal:

> An appeal may be amended, subject to approval by the commission, to clarify or amplify allegations or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date of the appeal.

This language corresponds to that found in §PC 2.02(3), Wis. Adm. Code, relating to the amendment of complaints filed with the Commission. Both provisions indicate the Commission is to exercise its discretion in approving requests to amend the original filing.

In *Payne v. DOC*, 95-0095-PC-ER, 7/31/97, the Commission denied complainant's request to amend her complaint to include a race discrimination claim where the amendment was filed 24 months after complainant filed her initial complaint of sex discrimination, there was nothing in the original complaint to place respondent on notice that its treatment of a co-worker of complainant would be critical to its defense against complainant's allegations, and the new claim was not raised until the investigation of the original complaint had been completed and an initial determination issued. In *Ziegler v. LIRC*, 93-0031-PC-ER, 5/2/96, the Commission denied complainant's request to amend her complaint to add a claim of handicap discrimination arising from some of the same conduct described in her initial complaint of age discrimination. The amendment was not filed until more than 3 years had passed since complainant's resig-

nation, after an initial determination had been issued on the age discrimination charge and more than a year after complainant had retained legal counsel. An amendment to add claims of race discrimination and retaliation was not permitted in *Ferrill v. DHSS*, 87-0096-PC-ER, 8/24/89, where the request was filed after an initial determination had been issued. The Commission cited the potential for delay, the existence of a prior amendment and an extensive opportunity to amend before the issuance of the initial determination. Finally, in *Johnson v. DHSS*, 83-0032-PC-ER, 1/30/85, complainant's motion to amend his complaint to include sex discrimination was denied where it was filed two days prior to a scheduled hearing on probable cause as to allegations of race, color and handicap discrimination. The complainant in that case was represented by counsel and there was no indication the allegation of sex discrimination was not known or knowable at the time the original complaint was filed. However, amendment was permitted in *Butzlaff v. DHSS*, 90-0162-PC-ER, 11/13/92, where it did not threaten delay, there was no allegation of potential prejudice and the request to amend was filed before the commencement of an investigation. Unrepresented complainants are provided substantial leeway in terms of amending their complaints. *Dawsey v. DHSS*, 89-0061-PC-ER, 10/29/92.

The appellant appeared in this matter by his wife, a non-attorney. The Commission initially processed the appeal on an expedited basis, although appellant later requested, and was granted, two postponements of the hearing. On March 25, 1998, respondent faxed appellant two internal memoranda regarding appellant's candidacy for the position in question. The memoranda were contemporaneous to the hiring decision. Both memos stated that appellant had incidents of on-the-job alcohol use and suffered from physical problems with his feet that affected his ability to stand. Appellant should have been aware of a potential discrimination claim when he received the two memos. Appellant made no request to expand the issue for the scheduled hearing to include a claim of disability discrimination, nor did he file a formal discrimination complaint. He made no reference to discrimination during his opening statement or during the entire hearing. He first mentioned the *possibility* of a violation of the Wisconsin Fair

Employment Act in his post-hearing brief, filed in July of 1998. However, it wasn't until March 11, 1999, a full year after he filed his original appeal, that he filed a request to amend his appeal.

If the Commission granted appellant's request, the new claim would be subject to an investigation as described in ch. PC 2, Wis. Adm. Code. Appellant has submitted no explanation for the timing of his request and no arguments in support of it. Respondent objects to the request, although it has made no suggestion that it would be prejudiced if the request was granted. Respondent contends the request is untimely because it was filed more than 300 days after the initial appeal to the Commission. This argument fails to take into consideration the language of §PC 3.03(2), Wis. Adm. Code, which provides that amendments to an appeal "shall relate back to the original filing date of the appeal." Respondent also notes that the proposed amendment was filed "after an initial determination, formal or informal, was made in this matter." No initial determination has been issued in this matter. Initial determinations, described in §PC 2.07, Wis. Adm. Code, are only issued with respect to complaints, not appeals. Respondent also objects to appellant's request to amend because, rather than being made at a relatively early stage of the proceedings, the request was made after a hearing had already been held.

The Commission agrees that the timing of the appellant's request to amend, along with the absence of any justifications for the request, mean there is an insufficient basis to permit amendment of the appeal to add a claim of disability discrimination under the WFEA. Appellant's request was made well after the completion of a hearing addressing his claim under §230.44(1)(d), Stats. Permitting an amendment now to add a disability discrimination claim could mean going through the investigative process and could also result in a hearing on the issue of probable cause as well as a hearing on the merits of the discrimination claim. Appellant has not shown any reason for not having previously requested amendment. There is no suggestion that the discrimination claim was not apparent to him until after the completion of the hearing under §230.44(1)(d),

Stats. There is no contention that complainant did not have ample opportunities to identify a disability discrimination claim well before the commencement of the hearing.

The facts of this case are clearly distinguishable from those in *Hiegel v. LIRC*, 121 Wis. 2d 205, 212, 359 N.W. 2d 405 (Ct. App. 1984). In *Hiegel*, the complainant was unrepresented by counsel at the time she filed a sex discrimination claim relating to her wage rate. An initial determination of no probable cause was issued, and complainant appealed and requested a hearing. Complainant was represented by counsel at the hearing and she sought to introduce evidence relating to her employer's hiring practices. The hearing examiner excluded the evidence of sex discrimination in hiring because the notice of hearing, as well as the complaint, had been limited to allegations of sex discrimination relating to wages. The examiner's ruling was overturned on appeal. The Court of Appeals held:

> A respondent's fundamental right to due process requires that it be apprised of the issues involved in an administrative proceeding. . . . However, while it is true that [the employer] received inadequate notice of the discriminatory hiring issue, we agree with the circuit court that it would have been more reasonable for the examiner to allow Hiegel to amend her complaint and to adjourn the hearing for a sufficient period of time to allow [the employer] to prepare to meet the proposed evidence. We quote with approval the circuit court's reasoning, as follows:
>
> > [Hiegel] filed the complaint without the assistance of an attorney. She was assisted in drafting the language by an employee of the agency. The complaint was filed on a form drafted by the agency. The proceedings in which the issue was raised were not even a final hearing, but only a probable cause hearing. For the agency to take the position that it can participate in the drafting of the complaint, shape the language of the allegations, assist a complainant unschooled in the law and unrepresented by counsel in the preparation of a form complaint supplied by the agency itself, and then turn around and severely limit the scope of the evidence to be considered at a preliminary stage of the proceedings is fundamentally unfair.
>
> We conclude that the exclusion of evidence regarding sex discrimination in hiring deprived Hiegel of her right to due process.

In the present case, appellant was not limited by a complaint form. Instead, he was given free rein to describe the conduct he sought to have reviewed. He took no steps before the scheduled hearing to identify a claim of disability discrimination and he made no effort at hearing to identify such a claim. In contrast to *Hiegel*, the hearing in the present case on June 5, 1998, was a hearing on the merits, rather than a probable cause or other "preliminary" stage of the proceedings. It was not until appellant's post-hearing brief that he even mentioned the possibility of a claim under the Fair Employment Act. The hearing examiner was not presented with an option of adjourning the hearing to allow respondent to prepare to meet another legal theory because appellant did not identify the theory until his post-hearing brief and did not seek to amend his appeal until after the 300 day statutory time limit had run.

ORDER

Appellant's request to amend his appeal is denied. Because the Commission has fully addressed this matter as an appeal under §230.44(l)(d), Stats., it is dismissed.

Dated: June 21, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after

service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95